In the Supreme Court of the United States

OCTOBER TERM 1974

No. 74-27

THE LONG ISLAND RAIL ROAD COMPANY, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

QUESTION PRESENTED

In our view, the question presented is whether the Court of Appeals properly found that petitioner was entitled only to its actual damages pursuant to a stated formula as compensation for its unlawful inclusion in a general rate increase, and was not entitled to the "windfall" of its local rates for the period of unlawfulness.

STATEMENT

This case arose when the Tariff Executive Association—Eastern Railroads ("TEA-ER"), a rate bureau

formed pursuant to Section 5a of the Interstate Commerce Act (49 U.S.C. § 5b), adopted increased rail rates and charges pursuant to the 6% general increase authorized by the Interstate Commerce Commission in Ex Parte No. 262, *Increased Freight Rates, 1969,* effective in November 1969. Petitioner ("LIRR") claimed that the increase, which included rates on joint-line traffic to and from points on LIRR's lines, was adopted without LIRR's consent and over its objections. After disruption of rail service was threatened because of the dispute between LIRR and its connecting railroads, a shipper on LIRR's lines sought an injunction from the United States District Court for the Eastern District of New York to prevent such an occurrence. The connecting railroads cross-claimed against LIRR. The problem was initially resolved in the district court by adoption of a stipulation among the railroads to maintain service, pending referral of certain questions to the Commission to ascertain the rights and responsibilities of the various parties.

The Commission concluded, in two separate reports, that the inclusion of LIRR's joint rates in the Ex Parte No. 262 increase was proper. Ex Parte No. 262 (Sub-No. 1), *Petition for Declaratory Order—Rule 52 of Tariff Circular No. 20,* 337 I.C.C. 247; 337 I.C.C. 274.

LIRR then brought a third-party complaint in the district court action to review the Commission's orders, naming the United States and the Commission as third-party defendants.[1] The district court sus-

[1] The United States filed an answer confessing error, but the Commission defended the validity of its orders.

tained the Commission (350 F. Supp. 111), but on appeal the court of appeals reversed (Pet. App. A, 487 F. 2d 179), holding that the Commission had erred in finding that LIRR had "failed to take the proper steps to opt out of" the Ex Parte No. 262 increase; that LIRR "was entitled to a hearing before the new joint rates went into effect"; and that until such a hearing might be held, LIRR "had a right to insist on the maintenance of its existing joint rates" (Pet. App. A 23–24; 487 F. 2d at 182–183).

As a remedy for the unlawful inclusion of LIRR's joint rates in the increase, the court of appeals held that LIRR was entitled to recover from the connecting railroads only such damages as it actually suffered by reason of the unlawful increase in its joint rates. The court reasoned that if it "were to order that the Long Island should collect as damages the difference between what it had to charge as divisions of the joint rate and what its local rates[2] were when the charges were made, the Long Island would receive a windfall without any showing of actual damages."[3] The case was remanded to the district court to determine the

[2] The term "local rates" refers to rates applying solely to traffic on a single railroad's lines. Local rates apply on traffic which is transported only over one railroad's lines, and also on joint-line movements where no applicable joint rate is available. Where a joint rate is applicable it is quoted as one rate to the shipper; each participating carrier takes a share, or "division", of the joint rate. Where no joint rate is available, the total rate for a joint-line shipment is computed by adding together the combination of applicable local rates.

[3] That "windfall", though never precisely ascertained on the record, was generally agreed to exceed $70 million.

amount of any damages to which LIRR might be entitled (Pet. App. A 24–25; 487 F. 2d at 183).

Neither the Commission nor the connecting railroad appellees before the court of appeals sought further review of the court of appeals' decision. LIRR, on the other hand, continued to litigate the question of damages. As the result of a conference before the district court following the court of appeals' remand (at which LIRR maintained that it was entitled to its local rates as the proper measure of damages), petitions for clarification were filed with the court of appeals seeking further amplification of its remand to ascertain damages. Despite the court of appeals' clear ruling that LIRR was not entitled to collect its local rates for the period in which its joint rates were unlawfully increased, LIRR continued to argue that it was so entitled. On March 29, 1974, the court of appeals, in a supplemental opinion (Pet. App. A 28–30; 496 F. 2d 21), held that LIRR "is entitled to any net revenue reduction caused by the increased joint rates to which it objected", and elaborated its formula for the determination of damages.

Following the court of appeals' clarification of the damages issue, LIRR went back to that court, this time with a petition for rehearing of the clarifying opinion. Once again the question of damages, and LIRR's repeated claim that it was entitled to its local rates, were extensively argued. On May 1, 1974, the court of appeals granted rehearing (Pet. App. A 32–33), and in an opinion entered the same day (A 34–36), affirmed its earlier clarifying decision.

On July 29, 1974, LIRR filed the instant petition for a writ of certiorari in this Court.

ARGUMENT

As the principal decision of the court of appeals makes clear, the main point at issue (*i.e.*, whether LIRR took the proper steps to remove itself from the Ex Parte No. 262 increase) was resolved in LIRR's favor. The only remaining issue is the measure of recovery to which LIRR is entitled as a result of this admittedly improper increase, an issue which is unlikely ever to recur, since the nation's railroads and the rate bureaus have ceased any efforts to include LIRR in joint-rate increases over LIRR's objections, and the Commission has authorized no such increase in any order entered since the court of appeals' decision. The court of appeals has properly—and repeatedly—held that LIRR is entitled only to such actual damages as it can prove to have resulted from the unlawful increase, rather than the "windfall" of its local rates for the period of unlawfulness, and there is no occasion for further review of this essentially discretionary determination.

The sole basis for LIRR's alleged right to recover its local rates is the Commission's Rule 52(b) of Tariff Circular No. 20 (Pet. App. B 44; 49 C.F.R. § 1300.52 (b)). Rule 52(b) is a technical rule of tariff procedure outlining the course of conduct to be followed by a carrier which believes itself to have been named in a joint tariff without proper authority. The rule provides that a carrier is bound by the terms of a joint tariff in which it has lawfully concurred.

Where it has not lawfully concurred, it must demand payment under its lawful tariffs and may not seek to collect under the tariff in which it has not concurred. So here, when initially confronted with the Ex Parte No. 262 increase in its joint rates which it believed unlawful, LIRR properly sought to collect under what it contended was its lawful tariff. However, this effort was superseded when LIRR acceded to a stipulation in the district court under which it continued to collect its division of the increased joint rate.

The fact that the court of appeals later held that LIRR had taken proper steps to opt out of the increase does not give rise to an inference that Rule 52(b) entitles LIRR to recovery of its local rates for the period of the effectiveness of the joint rate increases. In essence LIRR argues that a rule of tariff procedure establishes a right to the collection of damages. Such a contention is patently incorrect, and the court of appeals properly rejected it more than once. Nor is there any support for LIRR's assertion that there is a policy behind the rule to punish other carriers when unlawful joint-rate increases are adopted (*e.g.*, Pet., at 11).[4]

[4] The Commission decisions cited by petitioner (Pet., p. 14) do not add substance to this argument. In *St. Louis & O'Fallon Ry. Co.* v. *E.St. L. & S. Ry. Co.*, 81 I.C.C. 538, the Commission found that, where a carrier had been unlawfully *excluded* from a joint rate arrangement but the joint rate for the entire movement was being collected by other carrier participants, those carriers had a duty to pay the excluded carrier the equivalent of its local rates until such time as the tariff was corrected to accord with the law. There is no issue in the pres-

Not only was there no prescribed *statutory* remedy for the wrong which was found—as in *Pollard* v. *Bailey,* 87 U.S. 520—there was no prescribed remedy at all. The court of appeals was thus free—and obligated—to formulate a remedy which is appropriate and equitable in the circumstances. Cf. *Pollard* v. *Bailey, supra.* This the court did, by holding that LIRR is entitled to whatever actual damages it can prove attributable to the harm done. This was an entirely proper action in the premises, and LIRR's continual and repeated objections to the court's remedy reflect nothing more than its desire to get more money from the respondent railroads—four of which, incidentally, are bankrupt.[5]

As earlier stated, the question here presented is not likely to recur, and is thus not a matter of continuing significance meriting plenary review by this Court.[6] In

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ent proceedings of excluding LIRR from collecting its division of the joint rate during the period of its unlawful inclusion in that arrangement, and the *O'Fallon* case is clearly inapposite. *Declaratory Order—Rule 52 of Tariff Cir. No. 20,* 337 I.C.C. 247, is similarly inapposite since it merely reiterates the requirement of Rule 52(b) that a carrier must demand the lawful rate, and says nothing about recovery for past wrongs.

[5] Penn Central, Central of New Jersey, Lehigh Valley and Erie-Lackawanna.

[6] The problem arose in three later general increase proceedings. Ex Parte Nos. 265 and 267, *Increased Freight Rates, 1970 and 1971,* 399 I.C.C. 125, and Ex Parte No. 281, *Increased Freight Rates and Charges, 1972,* 341 I.C.C. 288, all of which were decided prior to the court of appeals' decisions here. As to the combined Ex Parte Nos. 265 and 267 increases, petitioner did not seek judicial review. With respect to the Ex Parte No. 281 increase LIRR did seek review, and a three-judge court in the Eastern District of New York recently entered an order

all increases since the court of appeals' decision the right of LIRR to remove itself from general increases has been observed by the connecting carriers, the rate bureaus, and the Commission,[7] and on this issue the law is now settled. The sole remaining issue of damages has been extensively litigated, and an entirely equitable remedy imposed. There is no occasion for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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essentially following the court of appeals' decisions in the instant matter. *Long Island Rail Road Co.* v. *United States, et al.*, Civil Action No. 73 C 310 (E.D.N.Y.) (Order filed July 26, 1974). LIRR filed a notice of appeal from this order on August 9, 1974.

[7] *E.g.*, Ex Parte No. 295, *Increased Freight Rates and Charges, 1973, Nationwide*, 344 I.C.C. 589, and Ex Parte No. 305, *Nationwide Increase of Ten Percent in Freight Rates and Charges, 1974* (preliminary order entered June 3, 1974).